Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FINALCO, INC.,
Petitioner,

vs.

THEODORE STEVEN ROOSEVELT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What constitutes an effective "transfer" of "property of the debtor" for purposes of Bankruptcy Code § 727 objection to discharge determinations? Is the Third Circuit correct that all interests of the debtor in real property are not transferred until the deed is recorded, or is the Ninth Circuit correct that recording is not necessary to constitute a completely effective transfer?

2. Is record title to real property an interest in real property, or is the ability of the record owner of property to convey good title a "quirk"?

3. Is the encumbering of debtor's record title to real property a transfer of property of the debtor?

LIST OF PARTIES

The parties to the proceeding below were Finalco, Inc., a corporation doing business in Deerfield Beach, Florida (Petitioner), and Theodore Steven Roosevelt, a doctor and lawyer formerly residing in Glendora, California, and since relocated to Boise, Idaho (Respondent).

In compliance with Rule 29(6), Finalco, Inc. is a wholly-owned subsidiary of Finalco Group, Inc.

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PETITION FOR WRIT OF CERTIORARI

Finalco, Inc, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 23, 1996.

OPINIONS BELOW

The original published OPINION of the United States Court of Appeals for the Ninth Circuit, filed June 20, 1996, is reprinted as Appendix A to this Petition.

The published ORDER AMENDING OPINION, DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC of the United States Court of Appeals for the Ninth Circuit, filed October 23, 1996, in *In re Roosevelt*, 98 F.3d 1169 (9th Cir. 1996), amending the opinion at 87 F.3d 311 (9th Cir. 1996) is reprinted as Appendix B to this Petition.

The published OPINION of the Bankruptcy Appellate Panel for the Ninth Circuit, filed January 12, 1995, in *In re Roosevelt*, 176 B.R. 534 (9th Cir. BAP, 1995), is reprinted as Appendix C to this Petition.

The trial court's rulings are not published. The FINDINGS OF FACT AND CONCLUSIONS OF LAW by the Bankruptcy Court trial judge filed in the United States Bankruptcy Court for the Central District of California, were orally made at the hearing conducted July 8, 1993,

and page 192, lines 5 through 20 are reproduced in Appendix D to this Petition.

JURISDICTION

This petition seeks review of a final judgment of the Court of Appeals for the Ninth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the Circuit Court arose under 28 U.S.C. § 1291 which reviewed a final judgment of the Bankruptcy Court who has core jurisdiction to determine issues relating to discharge pursuant to 28 U.S.C. § 157(b)(2)(J).

STATUTES INVOLVED

This case involves a creditor's objection to a debtor's discharge in a bankruptcy case voluntarily commenced by the debtor pursuant to provisions of Title 11, United States Code. 11 U.S.C. § 727, in pertinent part, provides:

> 727. Discharge
> (a) The court shall grant the debtor a discharge, unless --
> (1) the debtor is not an individual;
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed --

> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;

11 U.S.C. § 101(54) provides:

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

Former California Civil Code § 5110.730 (now Family Code § 852) provides:

> "A transmutation of real property is not effective as to third parties without notice thereof unless recorded."

California Civil Code § 1214 provides:

> "Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property . . . in good

> faith and for a valuable consideration, whose conveyance is first recorded".

§ 544(a)(3) provides:

> "The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -- . . . a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists."

STATEMENT OF THE CASE

Fraud in connection with bankruptcy cases is rampant. The need to protect the integrity of real estate transactions has led virtually every state to enact recording laws that give certainty to the question of who has what interests in any particular piece of real property.

Bankruptcy Code § 727 provides that if, within the year before filing bankruptcy, the debtor transfers an interest in property of the debtor with intent to hinder, delay or defraud creditors, then the debtor is to be denied his discharge. The intention of the provision is obviously

to act as a deterrent to actions which reduce the assets passing to the trustee for liquidation and distribution to creditors. In this case, seven months before the filing of his bankruptcy, after the announcement of an adverse trial court ruling and before the judgment could be entered and recorded as a lien against his record title, Debtor, for no consideration, quitclaimed his separate property cotenancy interest in the family residence to his wife. Five months earlier, still within the year before the filing of bankruptcy petition, he had borrowed money against the property, conveying his record title to a trustee for the benefit of the lenders through recordation of a trust deed, giving the loan proceeds to his wife in exchange for no consideration. Despite the findings of fact that the real property was transferred with intent to hinder, delay and defraud creditors, the Circuit Court of Appeals for the Ninth Circuit held that neither of those events constituted a transfer of property of the Debtor such that his discharge should be denied under 11 U.S.C. § 727.

The basis for the ruling was the finding of fact that 17 months before the bankruptcy filing, while married and living with his spouse, the Debtor executed and delivered to his wife a written MARITAL SETTLEMENT AGREEMENT whereby the Debtor purported to transfer to his spouse all of his right, title and interest in and to the family residence in exchange for her transferring to him all of her right, title and interest in and to Debtor's medical practice and her interest in his legal education, her interests having been found to be valueless. The trial court found that this act constituted a transfer made with intent to hinder, delay and defraud creditors. The trial court held that in an action to recover a fraudulent transfer, based upon the provision in 11 U.S.C. § 548(d)(1), that a transfer

is not "made" until good as against a bona fide purchaser, the transfer for fraudulent transfer purposes was made when the quitclaim deed was recorded, and thus the transfer was avoidable under Bankruptcy Code § 548(a)(1) as a transfer within a year before filing made with intent to hinder, delay or defraud a creditor.

However, the trial court held that for purposes of the § 727 objection to discharge, all of Debtor's interests in the property were transferred when the marital agreement was executed more than a year before the filing of the bankruptcy such that (1) no interest of the Debtor was transferred when the trust deed was executed, delivered and recorded in favor of the lender within the year before the filing, and (2) no interest of the Debtor in property was transferred when the quitclaim deed was executed, delivered and recorded within the year before the filing. The Bankruptcy Appellate Panel, in a 2-1 split, affirmed the trial court, and the Ninth Circuit affirmed the BAP. A petition for rehearing to the Ninth Circuit, with a suggestion for rehearing en banc, was denied after correction of certain technical inaccuracies.

The objection to discharge trial was prosecuted by plaintiff under the theory that the MARITAL SETTLEMENT AGREEMENT was a fabrication that was accomplished after the quitclaim of the realty, and backdated to appear as though it had been accomplished at an earlier date. The trial court held, however, that the agreement was made more than a year before the bankruptcy filing. This case is the perfect example of the practical difficulties that litigation uncertainties create, the tremendous burden put on creditors to vindicate abuses by perpetrators of fraud whose collectability is at best

uncertain, and, in hindsight, how clever and beneficial the recording laws really are in eliminating these uncertainties when they involve interests in real property. At least the recording laws would be beneficial if the court's would interpret them according to their plain meaning.

The Ninth Circuit Opinion cites at page 7313 with approval, but entirely ignores, the following quotation, derived from § 727's legislative history, contained in *In re Lemley Estate Business Trust*, 65 B.R. 185, 189 (Bankr. N.D. Tex. 1986):

> "[A]ny transfer of an interest in property is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title, because possession, custody, and control constitute interests in property."

Record title is the ultimate evidence of control. Its constructive notice gives the record title holder the ability to control title to the property and the ability to control other interests, such as the ability to control encumbrancing of the property.

The Third Circuit held in the case of *In re MacQuown*, 717 F.2d 859 (3rd Cir. 1983) that "a transfer is complete for purposes of section 14(c)(4) [the predecessor to § 727] when it is good against bona fide purchasers." Use of the word "complete" is critical because it recognizes that equitable interests in property can be transferred separately from legal interests and record interests.

As noted at 76 *Corpus Juris Secundum 2d*, Records, § 3: "Although it has been held that recording acts cannot be extended by implication, but must be construed literally in the absence of ambiguity or language requiring judicial interpretation, recording statutes are remedial and should be liberally construed so as to attain the object intended by them. The design of recording laws is to prevent fraud in transactions by securing certainty and publicity in such dealings, and to provide protection for the future, rather than over events which have already taken place."

The reprehensible and damaging act committed by Debtor was not his execution and delivery of the Marital Agreement to his wife and the conveyance to her of whatever interests were transferred to her by that act 17 months before the bankruptcy. **The reprehensible and damaging act committed by Debtor was removing the realty and equity in it from the bankruptcy estate.** The Marital Agreement did not do that, but the quitclaim deed certainly did.

Here, but for the quitclaim deed, Debtor's 50% ownership interest in the real property would have been property of his bankruptcy estate despite the Marital Agreement. Under California's recording law, in particular Civil Code § 1214, an unrecorded conveyance is void as to a BFP. If Debtor had executed a bankruptcy petition in April 1990, instead of the quitclaim deed, the trustee would have been vested with the rights of a BFP of the record title pursuant to Bankruptcy Code § 544(a)(3). This court noted in *Begier v. IRS*, 496 U.S. 53 (U.S., 1990) that, "Although not defined by the Code, 'property of the debtor' is best understood to mean property that would have been part of the estate had it not been transferred."

REASONS FOR GRANTING THE WRIT

Certiorari is necessary to resolve a split because the opinion below directly conflicts with the opinion in the case of *In re MacQuown*, 717 F.2d 859 (3rd Cir. 1983) regarding interpretation of the Bankruptcy Code on a rule of national application which should be uniform throughout the country, and because the Opinion includes the shocking holding that record title to real property, as a matter of law, is not an interest in property; a ruling which, respectfully, is a question of exceptional importance.

The Ninth Circuit opinion is a dangerous precedent to leave viable. The holding that record title to real property is not an interest in property, that conveying an encumbrance on real property is not a transfer of an interest in property, that making, executing and recording a quitclaim deed is not a transfer of an interest of the record owner in the property, could reek havoc in not only the bankruptcy arena, but also the title laws of virtually every state in the union which all have improved upon the uncertainties of common law concepts of title by replacing them with the reliability and certainty of public record as proof of ownership.

The Ninth Circuit's ruling ignored clearly articulated state statutes which provide that the agreement at issue herein is not an effective conveyance as to creditors until recorded. They ignore the statutory provision that as to a bona fide encumbrancer for value without notice, such as the lenders who received the trust deeds, the purported conveyance under the Marital Agreement was void. They ignore the fact that record title to real property is tantamount to control over the property which the

legislative history to the Bankruptcy Code clearly states is an interest in property. And though they recognize the fact that § 727 is intended to punish conduct of the debtor which deprives the bankruptcy estate of property, they ignore the fact that but for the execution, delivery and recording of the quitclaim deed, the real property at issue would have been property of the bankruptcy estate.

CONCLUSION

WHEREFORE, Petitioner Finalco, Inc., prays that a writ of certiorari issue from This Honorable Court to review the judgment of the Court of the Appeals for the Ninth Circuit in *In re THEODORE STEVEN ROOSEVELT (Finalco v. Roosevelt)*. In the event that the petition is granted, Petitioner prays that the judgment of the Court of Appeals for the Ninth Circuit be reversed and that the cause be remanded with directions to affirm the judgment of the District Court for the Central District of California.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: THEODORE STEVEN ROOSEVELT, *Debtor.*	No. 95-55160
FINALCO, INC., *Appellant,* v. THEODORE STEVEN ROOSEVELT, *Appellee.*	BAP No. CC-93-02221-VhB OPINION

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brandt, Hagan, and Volinn, Judges, Presiding

Argued and Submitted
May 10, 1996—Pasadena, California

Filed June 20, 1996

Before: Cynthia Holcomb Hall, Diarmuid F. O'Scannlain, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Hall

COUNSEL

Russell H. Rapoport, Plotkin, Rapoport & Nahmias, Encino, California, for the appellant.

Philip Holmsey, Knapp, Petersen & Clarke, Glendale, California, for the appellee.

OPINION

HALL, Circuit Judge:

We are asked to decide when a transfer is to be deemed "made" for the purposes of 11 U.S.C. § 727(a)(2), which denies discharge to a debtor who transfers property with the "intent to hinder, delay, or defraud" within one year of filing his petition in Bankruptcy Court. We hold that a transfer is "made" once it is effective as between the parties to the transfer.

I.

Steven and Judy Roosevelt, a married couple, purchased a house on Green Oak Lane in Glendora, California (hereinafter "Glendora property") on August 9, 1984, and took title as joint tenants. On June 10, 1989, when the Roosevelts were having marital difficulties, they signed and executed a Marital Agreement. The Agreement divided all of the couple's community property and specifically provided that the Glendora property would be transmuted into Judy's separate property. The Bankruptcy Appellate Panel determined that Steven made this transfer with the "intent to hinder, delay, or defraud" his creditors.

Notwithstanding Steven's June 1989 transfer of his interest in the Glendora property, he joined Judy in executing two deeds of trust on the property on December 18, 1989—the first in favor of Frances Miles in exchange for $56,000 and the second in favor of Raymond Jensen in exchange for $56,000. On March 13, 1990, Steven and Judy filed a homestead declaration, thereby protecting a portion of their equity in the Glendora property from creditors.[1] On April 14, 1990, Steven quitclaimed his interest in the Glendora property to Judy and she immediately recorded the quitclaim deed.

In March 1990, Finalco Corp. sued Judy and Steven in an unrelated action and was awarded a $150,000 judgment against Steven. Steven filed for Chapter 7 bankruptcy on November 9, 1990. Finalco instituted an adversary proceeding contesting Steven's discharge under § 727(a)(2) on the grounds that he transferred the Glendora property within one year of his petition for bankruptcy with the "intent to hinder, delay, or defraud" his creditors. Specifically, Finalco argued that: (1) the June 1989 Marital Agreement was ineffective under California law (so that Steven did not actually transfer any interest in the Glendora property until he executed the December 1989 deeds of trust); (2) even if the Marital Agreement was a valid transfer, such a transfer is not deemed "made" under § 727(a)(2) until it is recorded (so that the transfer of the property under the Marital Agreement was not "made" until Judy recorded the quitclaim deed in April 1990); and (3) even if § 727(a)(2) deemed a transfer "made" once the Marital Agreement was executed, Steven nevertheless retained an interest in the Glendora property which he subsequently transferred within § 727(a)(2)'s one-year reachback period.

On October 11, 1993, the Bankruptcy Court rejected Finalco's arguments, denied its motion, and discharged Steven. It ruled that although Steven had the requisite intent to defraud,

[1] *See* Cal. Civ. Proc. Code §§ 704.710 et seq.

he had transferred the property to Judy on June 10, 1989—more than one year before he filed his November 9, 1990 Chapter 7 petition. The Bankruptcy Appellate Panel of the Ninth Circuit affirmed. This timely appeal followed.

We have jurisdiction over an appeal from the Bankruptcy Appellate Panel under 28 U.S.C. § 158(d). On such appeals, we conduct an independent review of the Bankruptcy Court's decision. *In re Pace*, 67 F.3d 187, 191 (9th Cir. 1995). We review a denial of discharge for "gross abuse of discretion." *See In re Cox*, 904 F.2d 1399, 1401 (9th Cir. 1990) (citations and internal quotations omitted) ("In the context of discharges we have applied a more deferential standard. . . . [W]e disturb [discharge decisions] only if we find a gross abuse of discretion."); *Shaver v. Shaver*, 736 F.2d 1314, 1316 (9th Cir. 1984) (same).[2]

II.

Finalco first argues that the 1989 Marital Agreement did not transfer the Glendora property from Steven to Judy. If this were true, our review would end and we would be compelled to reverse because Steven would not have transferred the property until he executed the deeds of trust in December 1989—a transfer well within § 727(a)(2)'s one-year reach-back period.

---

[2]While some cases review the denial of discharge under a purportedly different standard—reviewing findings of fact for clear error and reviewing conclusions of law de novo, *see, e.g., In re Devers*, 759 F.2d 751, 753 (9th Cir. 1985)—this standard is substantively identical to the "gross abuse of discretion" standard. *See In re Cox*, 904 F.2d at 1401 (citation omitted) (reciting "gross abuse" rule and then stating that "[w]e must defer to the bankruptcy court's conclusion that the discharge should be denied unless its factual findings are clearly erroneous or it applies the incorrect legal standard."). We therefore hold that these two standards are one in the same.

[1] Because the validity of the Marital Agreement determines the extent of Steven's rights in the Glendora property, and because we look to state law in determining property rights, we must use state law to evaluate the validity of the Agreement. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *In re Harrell*, 73 F.3d 218, 219 (9th Cir. 1996) (citation omitted) ("Since the Bankruptcy Code itself does not determine the existence and scope of a debtor's interest in property, these threshold issues are properly resolved by reference to state law."). Under California law, a married person may by agreement transmute an asset in which he has a community property interest into the separate property of his spouse. Cal. Fam. Code § 850(a).[3] The transmutation is valid between the spouses as long as it is "made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." Cal. Fam. Code § 852(a) (formerly Cal. Civ. Code § 5110.370).[4] An "express declaration" is one which "contains language which expressly states that the characterization or ownership of the property is being changed." *In re Estate of MacDonald*, 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 160 (Cal. 1990). The agreement need not use the word "transmutation" or "separate property" or "community property." *Id.* at 273, 272 Cal. Rptr. at 161.

[2] Under these standards, the Marital Agreement was a valid transmutation.[5] Paragraphs 5(a) and 5(b) of the Agree-

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[3]"Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration . . . [t]ransmute community property to separate property of either spouse." Cal. Fam. Code § 850(a).

[4]While a transmutation of real property is not valid as against third parties until it is recorded, *see* Cal. Fam. Code § 852(b), the validity of the Marital Agreement as against third parties is irrelevant to Finalco's contention that the Agreement is invalid between Steven and Judy.

[5]It is unclear whether a transmutation of real property must satisfy *both* the specific requirements for transmutations *and* the more general requirements for transfers of real property.

ment stated that both Steven and Judy had an interest in the Glendora property. Section 7(b) then provided:

> STEVEN and JUDY agree that *all property set forth in Exhibit D* and any property hereafter acquired by JUDY during the marriage by any means including but not limited to purchase, gift, bequest, devise, or descent *shall be* and remain *her separate property.*

Marital Agreement, ¶ 7(b) (emphasis added). Exhibit D listed the Glendora property. Thus, the Agreement acknowledged

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Under California law, a transfer of real property is valid only if: (1) the grantor signs the instrument conveying the property, *see* Cal. Civ. Code § 1091 ("An estate in real property . . . can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same . . ."); and (2) the instrument is delivered to the grantee, *see* Cal. Civ. Code § 1054 ("A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."). Because Fam. Code § 852 already requires a writing "made, joined in, consented to, or accepted by the [grantor spouse]," the real property rules in effect add only other requirement to the transmutation rules—delivery.

Even if we assume that the delivery requirement applies, we believe it was satisfied in this case despite the record's silence as to whether the Marital Agreement was actually delivered to Judy. Delivery may be presumed where, as here, no conflicting evidence exists. *See* Cal. Civ. Code § 1055 ("A grant duly executed is presumed to have been delivered at its date."). Alternatively, an instrument is deemed constructively delivered if the grantor so intended. *See* Cal. Civ. Code § 1059 (permitting constructive delivery if the instrument "is, by the agreement of the parties at the time of execution, understood to be delivered . . ."); *see also McCarthy v. McCarthy*, 82 Cal. App. 2d 166, 168 (Ct. App. 1947). Here, the parties provided that the Agreement itself could be recorded, an act that would be meaningless unless Steven intended the Agreement to have immediate effect. *See* Marital Agreement, ¶ 17 ("This Agreement . . . may be recorded at any time . . . in any place . . . authorized by law for the recording of documents affecting title to or ownership status of property . . ."); *see also* Bankruptcy Court Findings of Fact and Conclusions of Law, at 3 ("The MARITAL AGREEMENT was intended to be an instrument of conveyance . . .").

that Steven had an interest in the Glendora property and then declared the property to be Judy's separate property. The Agreement "contains language expressly stating that the ownership of the property is being changed" and was therefore a valid transfer of the Glendora property as between Steven and Judy.[6]

III.

Finalco contends that, even if the Marital Agreement was valid between Steven and Judy, that discharge was still improperly denied because § 727(a)(2) does not deem a transfer "made" until it is recorded—which in this case was within one year of when Steven filed his bankruptcy petition. The question of when a transfer is "made" is a question of federal law, subject to our de novo review. *In re Schuman*, 81 B.R. 583, 585 (9th Cir. B.A.P. 1987) (citation omitted) ("When a transfer occurs within the meaning of the Bankruptcy Code is a question of law and subject to de novo review."); *see In re MacQuown*, 717 F.2d 859, 862-63 (3d Cir. 1983) (deciding this issue as a matter of federal law before turning to state law to examine when a transfer is valid under state law); *In re Roy*, 42 B.R. 102, 104-05 (Bankr. S.D. Fla. 1984) (same).[7]

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[6]That Steven lived in the house after its transmutation is irrelevant. *See Ogg v. Gunderson*, 74 Cal. App. 2d 384, 387 (Ct. App. 1946) ("The validity of a deed is not necessarily impaired by the fact that the grantor after delivery of the deed continued to exercise control over the realty . . . The primary test is whether the grantor intended to make a present transfer . . .").

[7]A few courts have erroneously looked to state law to see when a transfer is valid against third parties without first deciding the previous question of what type of validity—as between the parties or as against bona fide purchasers—is required by federal law. *See, e.g., In re Ingersoll*, 124 B.R. 116, 121 (M.D. Fla. 1991) (citing state law that a transfer is effective against third parties once it is recorded, but never discussing why a transfer is "made" only if it is effective against third parties instead of being "made" when it is effective between the parties to the transfer); *In re Gonzalez*, 92 B.R. 960, 961-62 (Bankr. S.D. Fla. 1988) (same); *In re Ford*, 53 B.R. 444, 447 (W.D. Va. 1984), *aff'd sub nom. Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985) (same).

[3] We start, as always, with the plain language of the statute. Section 727(a)(2) provides that:

> The court shall grant the debtor a discharge, unless . . . the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed . . . property of the debtor, within one year before the date of the filing of the petition . . . .

11 U.S.C. § 727(a)(2)(A). Nowhere does the statute define when a transfer is "made." *See Matter of Kock*, 20 B.R. 453, 454 (Bankr. D. Neb. 1982) ("No definition of when a transfer is deemed to have occurred is contained in § 727."). *Compare* 11 U.S.C. § 548(d)(1) (stating that a transfer is "made" when it is valid against a bona fide purchaser for purposes of the fraudulent transfer provision).

[4] Nor does § 727(a)(2)'s legislative history clarify the statute's silence. While Congress has expressly specified when a transfer is to be deemed "made" for other provisions of the Bankruptcy Code,[8] it failed to do so for the provision governing the denial of discharge. *See* Amendments to Bankruptcy Act of 1898, ch. 487, § 4, 32 Stat. at 798 (designating as a new ground for denying discharge the transfer of property with the intent to hinder, delay, or defraud—in § 14(c)(4)—without defining when a transfer was deemed "made").[9] Both

[8] *See* Amendments to Bankruptcy Act of 1898, ch. 487, § 13, 32 Stat. 797, 799-800 (1903) (deeming a transfer "made" at the time it was recorded for the purposes of preferential transfers); Bankruptcy Act of 1938, Amendments, ch. 575, § 67(d)(5), 52 Stat. 840, 878 (1938) (deeming a transfer "made" at the time it was recorded for the purposes of fraudulent transfers).

[9] We will not trace the language in § 14(c)(4) to § 3(a)(1) of the Bankruptcy Act of 1898, because § 3(a)(1) was wholly unrelated to denials of

the text and legislative history of this statute indicate that Congress left this decision to the courts. In this absence of Congressional guidance, courts have responded with two different timing rules. The first rule, which Finalco urges us to adopt, deems a transfer "made" under § 727(a)(2) only when it is valid as against bona fide purchasers ("BFPs"). *See In re MacQuown*, 717 F.2d at 863 (footnote omitted) ("[A] transfer is complete for purposes of section 14(c)(4) [§ 727(a)(2)'s substantively identical predecessor statute] when it is good against bona fide purchasers."); *In re Roy*, 42 B.R. at 104 (same); *In re McKane*, 155 F. 674, 676 (Bankr. E.D.N.Y. 1907) (same). In California, a transfer of real property is valid against bona fide purchasers when it is recorded. *See, e.g.*, Cal. Civ. Code § 1214 ("Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded . . . unless the conveyance shall have been duly recorded prior to the record of notice of action."). Thus, this rule—which we shall call the "BFP rule"—effectively provides that a transfer is not "made" under § 727(a)(2) until the instrument of transfer is *recorded*.

[5] The second rule, which the BAP adopted here, and which Steven urges us to adopt, deems a transfer "made" for the purposes of § 727(a)(2) once it is effective between the parties to the transfer, whether or not it is valid as against bona fide purchasers. *See Matter of Kock*, 20 B.R. at 454 ("[A] 'transfer' for the purpose of § 727(a)(2) occurs when, in this case, the mortgage is given by the debtors and not when it is perfected by the mortgagee by filing in the Register of Deeds' office."); *In re Plank*, 289 F. 900 (D. Mont. 1923)

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discharge. *See* Bankruptcy Act of 1898, ch. 541, § 3(a), 30 Stat. 544, 546 (1898). We do not believe that the similarity of the words in §§ 3(a)(1) and 14(c)(4) can trump the dissimilarity of the *purposes* those words were attempting to accomplish: Section 3(a)(1) defined the grounds for involuntary bankruptcy and § 14(c)(4) defined the grounds for denial of discharge.

(finding that a transfer is "made" on the date of the deed's execution); *In re Munden*, 8 B.R. 142, 144 (Bankr. E.D. Va. 1981) (holding that a debtor's transfer of his house is "made" on the date of the deed, so that the debtor's failure to list the house as an asset does not provide grounds to revoke his discharge for fraud). Because California deems a transfer of real property valid between the parties on the date the deed or agreement is delivered, *see* Cal. Civ. Code § 1054 ("A grant takes effect . . . only upon its delivery by the grantor."), and because delivery is presumed to be made on the date of the deed, *see* Cal. Civ. Code § 1055 ("A grant duly executed is presumed to have been delivered at its date."), this rule—which we shall call the "party rule"—effectively provides that a transfer is "made" under § 727(a)(2) on the date the agreement or deed of transfer is *executed*.

Our Circuit has not yet adopted either rule, so we are squarely faced with an issue of first impression. Finalco proffers three reasons why we should adopt the BFP rule. It first observes that both § 727(a)(2) and § 548 of the Code involve situations where the debtor has transferred his property with the intent to hinder, delay, or defraud his creditors. *Compare* 11 U.S.C. § 727(a)(2) *with* 11 U.S.C. § 548(a)(1).[10] Because, Finalco argues, § 548 defines the time of transfer as the time when the transfer is recorded, *see* 11 U.S.C. § 548(d)(1),[11] section 727(a)(2) should do the same.

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[10]In relevant part, § 548(a)(1) provides: "The trustee may avoid any transfer of an interest of the debtor in property . . . that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntary . . . made such transfer . . . with actual intent to hinder, delay, or defraud . . ." *Id.*

[11]Section 548(d)(1) states:

> For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 548(d)(1).

Steven responds that drawing an analogy between these two provisions solely on the basis of their similar language is a mistake because they serve different purposes that require different timing rules. Section 727(a)(2), he notes, "center[s] on the debtor's wrongdoing in or in connection with the bankruptcy case." S. Rep. No. 598, 95th Cong., 2d Sess. 98 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5884. Section 548, he contrasts, gives the bankruptcy trustee the power to avoid transactions and bring them back into the debtor's estate, a power that is not limited to situations where the debtor acted with the intent to defraud. *See* 11 U.S.C. § 548(a)(2) (allowing avoidance of transfers because they were made for less than "reasonably equivalent value").[12] Thus, he argues, § 548 seems more concerned with protecting creditors; because recording statutes share the same purpose, it makes sense that § 548 should use the date of recording as the means of accomplishing its purpose. Section 727(a)(2), on the other hand:

> premises denial of discharge on certain conduct of the debtor in relation to his assets and creditors if done with "intent to hinder, delay or defraud." Thus, one of the principal points of focus in litigation involving that sub-section involves certain conduct coupled with an appropriate guilty state of mind. That suggests to me that the "transfer" which is contemplated by § 727(a)(2) focuses on the time of the debtor's activity and not when the activity is somehow fully-insulated from the claims of other creditors.

[12]We recognize that serving one of these two goals often advances the other. A denial of discharge, even when aimed at punishing the debtor, has the effect of protecting creditors. By the same token, some of the trustee's avoidance powers under § 548 are invoked by the debtor's wrongdoing. *But see* 11 U.S.C. § 548(a)(2). We are, however, more concerned with the *primary* purposes of the two statutes, not their incidental effects.

Matter of Kock, 20 B.R. at 454. We agree with Steven that the analogy Finalco draws between § 548 and § 727(a)(2) is inapt; we further find the "party rule" to be more consistent with the purposes animating § 727(a)(2) than the "BFP rule."

Finalco argues that, even if we are not persuaded to adopt the BFP rule for § 727(a)(2) because it is used in § 548, we should nevertheless adopt it because it is more practical. By focusing on when a transfer is recorded—an event with a verifiable paper trial—courts can avoid evidentiary disputes over when deeds were executed or agreements signed. *In re MacQuown*, 717 F.2d at 863 ("[A]n additional advantage to using the recording date, as opposed to the inter se transfer date, is that it eliminates most disputes about the effective date."); *see also* 4 *Collier on Bankruptcy* ¶ 727.02[2], at 727-14 (15th ed. 1996) ("[The BFP rule] would avoid any controversy concerning exactly when the transfer occurred, since the date of recordation is a matter of public record."). While we recognize that this is a valid concern, we note that it is the function of the lower courts to determine facts and assess the credibility of witnesses. *See United States v. Chischilly*, 30 F.3d 1144, 1150 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 946 (1995) (recognizing the "fact-finding and credibility-weighing functions" of the district court). We do not believe that relieving the lower courts of a function which they are already competent to perform is a reason unto itself to adopt the "BFP rule."

Finally, Finalco opines that the BFP rule would encourage debtors to disclose their transfers, thereby preventing a dishonest debtor from concealing a fraudulent transfer for more than a year in order to avoid § 727(a)(2)'s one-year reach-back. Finalco's concern is misplaced. Section 727(a)(2) already denies discharge to a debtor who conceals his property with the intent to hinder, delay, or defraud. *See* § 727(a)(2)(A). Thus, courts following the "party rule" would not discharge a debtor who failed to record if he did so for the purpose of concealing the transfer. *See* 4 *Collier* ¶ 727.02[2],

at 727-14, -15 ("Under [the "party rule"], it must be recognized that some failures to record transfers are intentional and are in the nature of continuing concealments, in which case the date of recordation should be used to determine whether the transfer occurred during the one-year period.").[13]

[6] Steven offers two reasons why we should adopt the "party rule." He first observes that courts are to construe "the provisions denying a discharge to a debtor . . . liberally in favor of the debtor and strictly against the creditor." *In re Weldon*, 184 B.R. 710, 712 (Bankr. D.S.C. 1995); *see also In re Devers*, 759 F.2d at 754 (same). Of the two rules that might clarify § 727(a)(2)'s ambiguous language, the party rule—which protects those debtors who transfer but fail to record as well as those who record—is the one that enables a greater number of debtors to be discharged. Steven also points out a second drawback to the "BFP rule": It makes a debtor who was otherwise eligible for discharge (because his fraudulent transfer of property was made outside the one-year reachback period) suddenly ineligible simply because his transferee, over whom he had no control, decided to record during the one-year period. This, he concludes, unfairly extends the reachback period.

[7] While we are not terribly moved by Steven's second argument, we believe that § 727(a)(2) focuses on the debtor's wrongdoing and that the "party rule" is more tailored to serving that goal than the "BFP rule."[14] Thus, a transfer under

[13]Concealment is not an issue in this case, as it was never argued to the Bankruptcy Court.

[14]Finalco argues that this holding will create a split in the federal Circuit courts. The Third Circuit purported to hold, in *MacQuown*, 717 F.2d at 863, that a transfer of property under § 14(c)(4) was "made" when the transfer was recorded. The parties dispute whether this "holding" is dicta. We need not resolve this dispute, however; even if *MacQuown*'s holding is not dicta, we have recognized that we will not "create a direct conflict with other circuits" "absent a strong reason to do so." *United States v.*

§ 727(a)(2) is "made" at the time it is valid between the parties to that transfer, irrespective of whether it is valid as against BFPs. The Marital Agreement was valid as between Steven and Judy on June 10, 1989—a date outside § 727(a)(2)'s one-year reachback period. Accordingly, we find no error in the Bankruptcy Court's grant of discharge.

IV.

Finalco argues that it should prevail even if Steven transferred the Glendora property more than one year before he filed his bankruptcy petition because Steven retained an interest in the Glendora property when he executed the Martial Agreement; that interest, Finalco asserts, is what Steven transferred when he executed the two deeds of trust in December 1989, when he filed a homestead declaration in March 1990, and when he executed the quitclaim deed in April 1990. Because these acts took place within the one-year reachback period, Finalco concludes, Steven's fraudulent transfer of this retained interest warrants a denial of discharge.

We cannot agree. Steven certainly did not retain any interest in the property through the Marital Agreement. Paragraph 10 stated that:

> STEVEN and JUDY agree that each party waives and relinquishes, to the fullest extent lawfully possible, all right, title, claim, lien or interest . . . in the other's separate property . . .

[8] The deeds and declarations Steven subsequently executed also do not support Finalco's contention that Steven

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Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) (citing *United States v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988)). We believe that the reasons we have cited in the text of our opinion are sufficiently strong to justify our departure from the course plotted by our sister Circuit.

retained any interest in the property. The quitclaim deed executed in April 1990, which by its very definition can only convey whatever interest the grantor has in property (including no interest), is not inconsistent with Steven's prior surrender of his interest in the Glendora property. Nor did Steven, via the execution of the deeds of trust or filing of the homestead declaration, take back any interest in the property; even if we somehow construed these documents as an attempted retransmutation of the Glendora property back into community property, the attempt failed because neither document included language "expressly stat[ing] that the characterization or ownership of the property is being changed." *In re Estate of MacDonald,* 51 Cal. 3d at 272, 272 Cal. Rptr. at 160. As such, they would have been invalid transmutations. *Id.*

[9] Thus, the only possible interest that Steven could have retained in the Glendora property is one that arises automatically in every California real property transaction: A continuing ability to deal with the property in bad faith, and pit subsequent purchasers against one another. Although, under California law, a conveyance of real estate is valid between the grantor and grantee even if unrecorded, *see* Cal. Civ. Code § 1217, that conveyance is void as against subsequent bona fide purchasers who record before the original grantee does. *See* Cal. Civ. Code § 1214. Thus, if a grantor conveys real estate and the grantee does not record the transfer, the grantor retains the ability to reconvey the real estate to a bona fide purchaser, who can defeat the initial grantee's interest if she records before the grantee does. This is the interest that Finalco asserts that Steven retained after he executed but did not record the Marital Agreement.

[10] Whether or not Steven's ability to give a subsequent bona fide purchaser the right to defeat the initial grantee's interest may be an "interest," it must also be an interest in *property* for it to be subject to a "transfer" under the Bankruptcy Code. Section 101(54) defines a transfer as:

> every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an *interest in property*, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

11 U.S.C. § 101(54) (emphasis added). Although this definition is to be construed broadly, *In re FBN Food Services, Inc.*, 185 B.R. 265, 272 (N.D. Ill. 1995), *aff'd*, 82 F.3d 1387 (7th Cir. 1996), the statute clearly requires that an interest *in property* be conveyed. *See In re Lemley Estate Business Trust*, 65 B.R. 185, 189 (Bankr. N.D. Tex. 1986) ("[A]ny transfer of an interest *in property* is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title, because possession, custody, and control constitute interests *in property*.") (emphasis added).

[11] Whether a property interest exists is a matter of state law. *See In re Harrell*, 73 F.3d at 219. Under California law, a person has an interest in property if he has the right to possess and use it to the exclusion of others. Cal. Civ. Code § 654 ("The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."). Here, Steven *himself* has no right to the exclusive possession and use of property he gave away twice—he only has the ability to convey to a subsequent bona fide purchaser the "right to possess and use." Thus, Steven's ability is not a property interest as it is defined by statute.

Moreover, that this so-called "interest" exists at all is a quirk of the recording statutes themselves. These statutes are designed to assign priorities among competing stakeholders in a piece of property. They are not designed to create a property interest in a dishonest grantor who can continue to give away the same piece of property until one of his buyers records the transaction. Thus, as a matter of policy as well, we reject Finalco's argument that Steven retained a property interest in

the Glendora property after he executed the Marital Agreement.

V.

For the foregoing reasons, we AFFIRM the decision of the Bankruptcy Appellate Panel granting Steven a discharge of his debts.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: THEODORE STEVEN ROOSEVELT, *Debtor.*	No. 95-55160
	BAP No. CC-93-02221-VHB
FINALCO, INC., *Appellant,* v. THEODORE STEVEN ROOSEVELT, *Appellee.*	ORDER AMENDING OPINION, DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Filed October 23, 1996

Before: Cynthia Holcomb Hall, Diarmuid F. O'Scannlain, and Andrew J. Kleinfeld, Circuit Judges.

ORDER

The opinion filed on June 10, 1996, appearing at 87 F.3d 311 (9th Cir. 1996), is amended as follows:

Page 313, column one, penultimate line: delete "all of"; last line: delete "community" column two, paragraph 1, line 2: change "be" to "become", delete "transmuted into" line 3: delete "Bankruptcy Appellate Panel" and insert "trial court" line 6:

add a new sentence reading "Steven has not appealed that finding.

Page 314, column one, footnote 3, lines 3 & 4: delete "community property" and insert "separate property of one spouse"; change "either" to "the other"; line 5: change "(a)" to "(c)" column two, line 16: change "community" to "separate" line 33: insert a period between "property" and the closing quotation mark; delete "or 'community property.' "

Page 315, column two, line 1: change "denied" to "granted"

Page 318, column two, first paragraph, line 6: after "discharged." insert "Steven's argument neglects to mention, however, that this rule of construction is usually only applied in favor of honest debtors. *See Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). At the same time, it is not entirely clear how this general rule applies to a provision, like § 727(a) (2), that necessarily gives a fresh start to some dishonest debtors. As a result, the rule is of little help in construing this statute one way or the other." Then begin a new paragraph with "Stephen also points out. . . ."

At the end of the new second paragraph, insert a new sentence: "We do not find this argument terribly persuasive."

Page 318, column two, paragraph 2 (new paragraph 3) line 1: delete "While we are not terribly moved by Steven's second argument" and insert "Nonetheless, as argued above"

Page 319, column one, paragraph 3, line 16: change "community" to "his separate"

With this amendment, the panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

APPENDIX C

UNITED STATES BANKRUPTCY APPELLATE
PANEL OF THE NINTH CIRCUIT

FILED
JAN 12 1995
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

BAP No. CC-93-2221-VHB
In re THEODORE STEVEN ROOSEVELT, Debtor.
FINALCO, INC., Appellant,
v.
THEODORE STEVEN ROOSEVELT, Appellee.

September 21, 1994,
Submitted at Pasadena, California
Before: VOLINN, HAGAN, and BRANDT, n1 Bankruptcy Judges. BRANDT, Bankruptcy Judge, dissenting. n1 Hon. Philip H. Brandt, Bankruptcy Judge for the Western District of Washington, sitting by designation.

OPINION OF THE COURT
VOLINN, Bankruptcy Judge:

OVERVIEW

More than one year prior to filing a chapter 7 petition, the debtor and his wife transmuted their joint ownership in their residence into the separate property of

the wife. No contemporaneous recording of the transaction was performed, but within one year of the bankruptcy filing, the debtor executed and recorded a quitclaim deed to the residence in favor of his wife. The bankruptcy court found that the debtor transferred the residence to hinder, delay, or defraud creditors. The court concluded that while the deferred recording could be a basis for avoiding the transfer under § 548 n2 , in an action against the transferee, it could not serve as a basis for denial of the debtor's discharge under § 727 since the actual transfer occurred more than one year prior to bankruptcy. We affirm the bankruptcy court. n3

FACTS AND PROCEEDINGS BELOW

On June 10, 1989, the debtor, T. Steven Roosevelt (Steven) and his wife Judy Ann Roosevelt (Judy) executed a post-nuptial "marital settlement agreement." At the time, Steven was a defendant and counter-complainant in a state court lawsuit instituted by appellant Finalco, Inc. (Although Finalco also named Judy as a defendant in the litigation, she was subsequently dismissed.)

The marital agreement transmuted the couple's community and separate interests in their various properties and liabilities into separate property and liabilities of each. Among the transmutations, Judy received Steven's joint interest in the family residence, which at that time had a total unencumbered value of $ 233,000. The marital agreement was executed but not recorded.

Subsequently, on December 21, 1989, Steven and

Judy co-signed two deeds of trust on the residence. Steven and Judy recorded a homestead for the residence on March 16, 1990. On April 12, 1990, a quitclaim deed executed by Steven in Judy's favor was recorded.

Steven filed a chapter 7 petition on November 9, 1990. Alleging an intentionally fraudulent transfer of the residence, Finalco commenced an adversary proceeding objecting to Steven's discharge pursuant to § 727(a). In April, 1992, the Chapter 7 trustee commenced an adversary proceeding, inter alia, to avoid transfer of the residence. The bankruptcy court consolidated the issues and tried them on April 19, June 8, and July 9, 1993.

After trial, the court found that although Judy was a good faith transferee, Steven executed the marital agreement with an actual intent to hinder, delay and defraud his creditors. The court concluded that the marital agreement was a complete transfer of all of Steven's interest in the residence to Judy, but because the transfer took place more than one year prior to filing the petition, the court overruled Finalco's objection and granted Steven his discharge. Finalco appeals.

ISSUE PRESENTED

Finalco contends that the court erred by determining that the transfer of the residence occurred when the marital agreement was executed rather than at the time the quitclaim deed was recorded; in the alternative, Finalco contends that each event constituted a separate transfer.

STANDARD OF REVIEW

A mixed question of law and fact occurs when the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982); Moss v. Commission, 831 F.2d 833, 838 n.9 (9th Cir. 1987). Since the facts before us are undisputed, resolution of the issue will be determined as a matter of law, subject to de novo review.

DISCUSSION

For the purpose of § 727, the debtor's fraudulent transfer occurred more than one year prior to the bankruptcy.

11 U.S.C. § 727 in pertinent part states:

(a) The court shall grant the debtor a discharge unless--

. . . .

(2) the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . .

(A) property of the debtor, within one year before the date of the filing of the petition;

. . . .

11 U.S.C. § 727 (emphasis supplied).

The bankruptcy court noted that the date of perfection of an interest transferred is material as to avoidance of fraudulent transfers under § 548. n4 However, unlike § 548 (or for that matter, § 547(e)(2) which governs the timing of preferential transfers), no provision for the time of transfer appears in § 727, and § 548 expressly limits its timing provision "for the purposes of this section" (as does § 547). The court concluded that the marital agreement was an effective

transfer of all rights in the transferred property as between Steven and Judy. Because § 727 does not speak to transfers which may be subject to avoidance by virtue of a lack of timely recordation, the transfer of the residence effectively occurred when it actually happened, on June 10, 1989, more than one year prior to the bankruptcy. n5

Based on the foregoing ruling, the issue is whether, for the purposes of § 727, Steven transferred his interest in the residence upon execution of the marital agreement on June 10, 1989, more than one year prior to the bankruptcy, or rather when the quitclaim deed was recorded on April 12, 1990. n6

Finalco bases its argument on Cal. Civ. Code § 5110.730 (repealed 1994) (now Family Code § 852), which states: "a [marital] transmutation of real property is not effective as to third parties without notice thereof unless recorded." Cal. Fam. Code § 852(b) (West Supp. 1994). Based on this statute, Finalco contends that the residence did not transfer until April 12, 1990, the date the quitclaim deed was recorded and Judy's sole interest in the property became effective as to third parties. Finalco cites in support In re Rubin, 12 Bankr. 436 (Bankr. S.D.N.Y. 1981). This case is questionable authority. The issue was not raised, and as the Rubin court stated, had "not been pursued by the debtor." Id. at 439 n. 2. Nevertheless, the court gratuitously discussed the issue referring to a split of authority thereon and concluded that the transfer should be deemed to occur when it is fully effective against all interests. Id. Rubin's footnote cites 4 Collier on Bankruptcy P 727.02[2], which attempts to rationalize and equate recordation with

a present attempt to effect a transfer and adverts to the "split of authority," some of it longstanding -- see Matter of Plank, 289 F. 900 (D.C. Mont. 1923); In re McKane, 158 F. 647 (D.C.N.Y. 1907); also cited are In re Kock, 20 Bankr. 453, 6 Collier Bankr. Cas. 2d (MB) 849 (Bankr. D. Neb. 1982) (holding that transfer under § 727 focuses on time of original act); compare In re MacQuown, 717 F.2d 859 (3d Cir. 1983) (construing former Act § 14(c)(4) as looking to date of recordation); accord, In re Roy, 42 Bankr. 102 (Bankr. S.D. Fla. 1984); Rubin, 12 Bankr. 436.

Section 727, as distinguished from avoiding sections such as § 548, contains no provision or basis for considering an effective date for any of the acts enumerated other than the actual time such act or transfer took place. As to "transfer," the act here in question, its general definition is found in § 101(54):

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. 11 U.S.C. § 101 (54).

The legislative history articulates the definition's all-encompassing character. "The definition of transfer is as broad as possible." H.R. Rep. No. 595, 95th Cong., 1st Sess. 314 (1977). Although the definition of transfer is broad, it does not include any action taken by the transferee subsequent to the transfer such as recordation.

In this context, recordation is not an independent event, but is ancillary to and dependent on an existing transfer. To put it otherwise, a transfer has a life of its own whether or not recordation occurs. If there were no transfer, there would be no event to record.
To determine whether a transfer has occurred, we look at state law. Butner v. United States, 440 U.S. 48, 55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979). Pursuant to California law, "married persons may by agreement or transfer, with or without consideration, . . . transmute separate property of one spouse to separate property of the other spouse." Cal. Civ. Code § 5110.710 (repealed 1994) (now Family Code § 850). n7 California defines "conveyance" as "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills." Cal. Civ. Code § 1215 (West 1982). Quite clearly, this broad definition includes the transmutation of property permitted by § 852.

It would be an error of law to consider a transmutation of property to be less than a transfer of the transmutor's entire interest, or as Finalco insists, only a contract to convey. n8 To be valid, transmutation requires only that it be "made in writing by an express declaration." Cal. Fam. Code § 852(a) (formerly Cal. Civ. Code § 5110.730(a)). n9 The settlement agreement on its face purports to transmute the property, and the trial court's factual finding that it did so cannot be held clearly erroneous, nor can its conclusion that under California law, the agreement constituted a legal transfer. In re Marriage of Trantafello, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979) (agreement between husband and

wife that community property may become separate property of either of them is effective to accomplish a change in status of the property); Somps v. Somps, 250 Cal. App. 2d 328, 58 Cal. Rptr. 304 (1967) (transmutation from community property to separate property occurs when spouses agree to change the character of the property); Mears v. Mears, 180 Cal. App. 2d 484, 4 Cal. Rptr. 618 (1960) (persuasive evidence of an understanding between husband and wife to change the status of their property will rebut the presumption arising from the form in which the property is held).

Nevertheless, Finalco argues that the quitclaim deed constituted an independent or further transfer of some residual interest of the debtor in the property. As noted, until the quitclaim deed was recorded, the marital transmutation was not effective against creditors without notice, and therefore the residence was potentially subject to the reach of Steven's creditors. It is arguable that until Judy was protected by recordation of the quitclaim deed Steven might benefit by having left over for himself assets which his creditors might ignore in preference to an attack on Judy's as yet unprotected interest in the residence. It does not follow, however, that Judy's exposure to the debtor's creditors constituted a property interest of the debtor, and in any event, arguments as to hypothetical benefits to be received by the debtor are based on speculation.

Finalco points to the primary events relating to the residence as: marital transmutation, followed by two encumbrances, followed by a declaration of homestead, and finally the quitclaim deed. Finalco then points out

how these events are interspersed with various stages of the Finalco litigation. This presentation attempts to demonstrate Steven's intent to defraud creditors through a continuing concealment. The narration is based on the premise that Steven retained an interest in the property after the marital transfer. The court was unpersuaded, finding that after the marital agreement was executed, Steven had no interest in the residence. We review the court's factual findings for clear error, and these subsequent acts do not contradict an ultimate finding that Steven had divested his interest in full.

Sections 727 and 548 take aim at different circumstances and operate for different purposes. Section 727 denies the undeserving debtor a discharge based on those acts that the Bankruptcy Code considers antithetical to its purpose for providing a fresh start to the deserving but improvident debtor.

On the other hand, § 548 serves to protect and conserve the debtor's estate for his creditors. Although an actual fraudulent transfer, which can also bar discharge, is included in § 548, the section also covers constructive, or innocent, fraud. To this end, the point of concern is creditors, and thus the timing of recordation or perfection, which diminishes the estate, is given importance.

Since § 727 concerns itself fundamentally with the debtor's behavior, and is not directed to avoidance of transfers, the issue of recordation is not germane. The acts listed in § 727 are those which give effect to a debtor's intent to defraud, hinder, or delay creditors by transfer, removal, destruction, mutilation, or

concealment. All of these, except for transfer, do not involve a voidable act. There is no compelling reason to treat an act of transfer as having a different temporal quality than an act of removal, destruction, mutilation or concealment. The happenstance of one of these acts being subject to avoidance under another section of the Code in an action against a third party transferee should not be a basis for enlarging or extending the time set in § 727 in an action against the debtor.

CONCLUSION

The legal basis for the court's conclusion that perfection of a transfer did not constitute a further transfer of the property is correct. Recordation by a transferee is not a transfer by the debtor. When, as here, a transferee is found to be a good faith transferee, it is evident that recordation per se demonstrates no intent to hinder creditors. The court did not find that Steven's delay in recording the quitclaim deed constituted a continuing concealment, and, on the facts presented, this was not clear error. The trial court order is AFFIRMED

n1 See Section 702 of the Reform Act.

n2 Unless otherwise stated, all references to "sections" refer to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq.

n3 The court order avoiding the transfer is the subject of another appeal: BAP No. CC-93-2217.

n4 For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law

permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee. . . ."11 U.S.C. § 548(d)(1)(emphasis supplied).

n5 The court found that when Steven transferred the residence to Judy, he possessed the requisite intent to satisfy denial of his discharge. The court stated in passing during the trial that, had the transfer occurred within the year prior to the date of filing, Steven's discharge would be denied.

n6 Finalco raises an additional argument that the marital agreement was not, in fact, a transfer, merely a contract to transfer. This contention has no merit; as discussed infra, the agreement is a transfer of rights effective between the parties.

n7 "Subject to Sections 851 to 853, inclusive, married persons
may by agreement or transfer, with or without consideration, do any of the following:(a) Transmute community property to separate property of either spouse. (b) Transmute separate property of either spouse to community property.(c) Transmute separate property of one spouse to separate property of the other spouse."Cal. Fam. Code § 850 (West 1994).

n8 The dissent suggests that Steven's failure to record the transfer left him a property interest that could be conveyed to third parties. Steven would have the ability, but not the right, to make such a transfer, and nothing in the record suggests that this was done. Alternatively, the dissent suggests that until recordation of the transfer,

Steven retained a vendor's lien. The cases cited do not support this analysis, and in any event a vendor's lien is satisfied upon payment of the consideration. The record reflects that Judy performed her obligations, and therefore, there was nothing to support a vendor's lien. As to the dissent's suggestion that Steven's delay in recording the transfer constituted a concealment of assets, the issue was never raised below nor before us on appeal. It would be inappropriate for us to raise and decide the issue sua sponte, particularly as it is a question of fact. The record is clear that the trial court did not find the transfers indicated a continuing concealment of assets.

n9 "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." Cal. Fam. Code § 852(a) (West Supp. 1994).

DISSENTING OPINION: PHILIP H. BRANDT

The quitclaim deed was more than mere perfection of an earlier completed transfer of Steven Roosevelt's interest in the house to Judy via the Marital Agreement's transmutation. Although the bankruptcy court found as fact that the Agreement accomplished a complete transfer of Steven's interest in the house, ascription of the consequence of the Roosevelts' actions is a matter of law. I would hold that Steven retained a lien or interest in the house until the quitclaim was recorded within one year of his petition, and reverse and remand for denial of his discharge.

Unlike removal, destruction, mutilation, or concealment, the other predicates for denial of discharge under § 727(a)(2) of the Bankruptcy Code n1 , the Roosevelts' transmutation of their marital property could be, and was, accomplished invisibly. Until the quitclaim was recorded, there was no indication to the outside world of the transfer. Months after the entering into the Marital Agreement, and within the look-back period, Steven (jointly with Judy) acknowledged and recorded a Homestead Declaration, claiming a homestead, ". . .making ourselves declared homestead owners . . ." (emphasis added), and stating he had a joint tenancy interest in the residence. Steven continued to live in the house until after his bankruptcy filing. Precisely because there was no outward sign of the transmutation which an interested creditor might discern, we should not consider the house completely transferred for discharge purposes until the recording, unless the authorities allow no alternative.

"Property" is not defined in the Code, but § 541(a) includes within the bankruptcy estate ". . . all legal or equitable interests of the debtor in property as of the commencement of the case." There is no justification for construing "property" in § 727 any more narrowly: if within the year prior to filing a debtor transfers something which would otherwise be property of the estate, with the requisite intent, the discharge is to be denied. Intent is not here at issue: Steven was attempting to hinder, delay or defraud his creditors. The determinative question is whether he transferred property within the look-back period.

So long as Steven had an interest of record, he

had the power effectively to convey that interest to a bona fide purchaser. n2 *In re Weisman (Robertson v. Peters)*, 5 F.3d 417, 420 (9th Cir. 1993). Likewise, any creditor who obtained a judgment against him and properly recorded an abstract would have a lien on the house. n3 That Steven might thereby be liable to Judy, or that the Marital Agreement transmuted the status of their property as between them, does not alter those facts, or the legal conclusion they compel: he retained an interest in the real property. I have held in a fraudulent transfer case governed by Washington law that the debtors' conveyance of bare legal title to a self-settled trust of which they were the sole beneficiaries was a transfer which could be fraudulent under § 548, although the conveyed property remained reachable by their creditors. *In re Wallaert*, 149 Bankr. 665 (Bankr. W.D. Wash. 1992). I would apply the same principle, that title is an interest in real property, here.

Alternatively, Steven had a lien. Even if the Marital Agreement was a conveyance, it was in part a real estate contract, with the parties promising and obligated to reciprocal performances. n4 Steven's retained legal title was a lien, *Avery v. Clark*, 87 Cal. 619, 625, 25 P. 919, 22 Am.St.Rep. 272 (1891); *Maltby v. Conklin*, 50 Cal. App. 201, 195 P. 280, 282 (1920), or he had a vendor's lien. California Civil Code § 3046 (West 1994) provides:

One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

The statute, enacted in 1872, codifies California

authorities going back to early statehood, which based the lien in equity. *Salmon v. Hoffman*, 2 Cal. 138, 143 (1852) and *Walker v. Sedgwick*, 8 Cal. 398, 403 (1857).

California authority supports the Marital Agreement giving rise to a vendor's lien. *In Ira v. Ira*, 104 Cal. App. 2d 41, 230 P.2d 867 (1951), a case in which the parties' intent to effect a present conveyance was much clearer from the agreement than in the case before us, and the agreement was recorded, the court unequivocally held the plaintiff wife had a vendor's lien. n5

California law recognizes waiver of a vendor's lien, provided it is clearly manifested. *McGreevy v. Constitution Life Ins.* Co., 238 Cal. App. 2d 364, 369, 47 Cal. Rptr. 711 (1965). There is room for argument that Steven waived his vendor's lien, in that para. 10 of the Agreement provides:

. . . each party waives and relinquishes, to the fullest extent lawfully possible, all right, title, claim, lien, or interest, whether actual, inchoate, vested or contingent, in law or equity, under the laws of any state or federal law, in each other's separate property, separate property income and separate property estate by reason of the marriage, ... (emphasis added)

It matters not whether the underlined phrase modifies "right, title, claim, lien or interest," or only the clause in which it appears. Steven's interests in the house (title, lien of retained title, or a vendor's lien) did not arise by reason of the marriage, but from his status as an owner of record and from the Agreement.

Even if Steven intended a waiver of his vendor's lien, he had record title until the quitclaim was recorded, within a year of his petition. In delivering his deed n6 , Steven transferred his remaining interest in the house to Judy, relinquishing his lien (if any), and effectuating his fraudulent intent. Since § 727(a)(2)(A) does not require any particular quantum of property to be transferred, the bankruptcy court should be reversed: Steven, with his law and medical degrees and practices, attempted to defraud his creditors. He was not a poor but honest debtor entitled to a discharge.

n1 11 U.S.C.: unless otherwise indicated, all references to "section" or "§ " are to the Bankruptcy Code.

n2 Cal. Civ. Code § 1214 (West 1994) provides:Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee . . . in good faith and for a valuable consideration , whose conveyance is first duly recorded, and against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record [sic] of notice of action.

n3 Cal. Code Civ. Proc. § 697.310 before the declaration of homestead; § 704.950 after (lien attaches to excess over pre-declaration liens and encumbrances and homestead exemption). See *In re Chabot*, 992 F.2d 891 (9th Cir. 1993).- - - - - - - - - -

n4 Besides agreeing in para. 12 of the Marital Agreement to execute whatever "deeds, releases, assignments or other instruments, and such further assurances and instruments as may be reasonably required or requested. . .," to accomplish the transfers of

real and various personal property (including interests in limited and general partnerships and a professional corporation), each party undertook to pay certain of the joint liabilities.

n5 Although a Ninth Circuit case, Transducer Patents Co. v. Renegotiation Board, 492 F.2d 247 (1974), in considering the respective interest of the parties in a patent, states, at 250, that the vendor's lien does not arise unless there is a sum certain due, citing Gard v. Gard, 108 Cal. 19, 40 P. 1059 (1895), neither the statute nor the California cases require that. In Gard, the court relied on Pomeroy's Equity Jurisprudence, not the statute, and the court's precise holding was that the plaintiff's later agreement extinguished his vendor's lien, if he had one. Further, the California Supreme Court quoted the trial court's conclusion that the purchaser's obligation was contingent and indefinite. Here, the Marital Agreement requires specific and uncontingent performance from Judy.

n6 Steven executed the deed on 22 March 1992, within a year before his petition. We need not here be concerned about the possibility of a third party's action or inaction (in failing to record a deed delivered before the look-back period until within it) affecting his discharge.

APPENDIX D

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. LA 90-28723 WL
Adv. No. LA 92-02142 WL
Adv. No. LA 91-60491 WL
(Chapter 7)

In re THEODORE STEVEN ROOSEVELT,
Debtor.

DAVID RAY, Chapter 7 Trustee,
Plaintiff,
v.
T. STEVEN ROOSEVELT; et al.
Defendants.

FINALCO, INC.
Plaintiff,
v.
T. STEVEN ROOSEVELT; et al.
Defendants.

EXCERPTS OF TRANSCRIPT OF HEARING

DATE: JULY 8, 1993
TIME: 8:00 A.M.
PLACE: COURTROOM 1539

* * * * * TEXT MISSING

Page 192, lines 5 through 20:

"THE COURT: All right. Let's start off with the dischargeability -- I mean -- the discharge matter, the Section 727 matter. I'm making my findings on the record so they don't have to be set forth in a separate document. That is, the marital agreement was executed on June the 10th, 1989. It caused transfers of property, which were valid as between the debtor and the transferor.

More that one year prior to the filing of the petition is when those transfers took place. And for discharge purposes, I will find that the transfer took place as of the date that it became effective between transferor, transferor and transferee. That is more than one year.

Therefore, the requirement in order to fall within Section 727, that the transfer occur within one year prior

to the filing of the petition in bankruptcy, has not been met; and Dr. Roosevelt will get his discharge."

* * * * * TEXT MISSING

(2)

Supreme Court, U.S.
FILED
MAR 31 1997
CLERK

No. 96-1183

In The

Supreme Court of the United States

October Term, 1996

FINALCO, INCORPORATED,

Petitioner,

vs.

THEODORE STEVEN ROOSEVELT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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20 pp

QUESTION PRESENTED

Respondent respectfully represents that the question more properly before this Court is whether the effective date of a transfer otherwise sufficient to deny the discharge of a debtor under 11 U.S.C. § 727(a)(2) must also be perfected against a bona fide purchaser more than one year before a debtor files a bankruptcy petition.

LIST OF PARTIES

Respondent respectfully requests that this Court take judicial notice of the following facts:

1. The Petitioner, Finalco, Incorporated, is a Delaware corporation and has been assigned corporation number 069-1814 by the State of Delaware;

2. Finalco Group, Inc., is also a Delaware corporation and has been assigned corporation number 068-2828 by the State of Delaware.

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The Respondent, Theodore Steven Roosevelt, respectfully prays that the Petition for Writ of Certiorari, filed by the Petitioner Finalco, Incorporated to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions rendered in the proceedings below.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

Constitution of the United States, Article I, section 8, clause 4.

> The Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States.

11 U.S.C. § 548(d)(1):

> For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A) provides in pertinent part:

> (a) The court shall grant the debtor a discharge, unless —
>
> * * *
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
>
> (A) property of the debtor, within one year before the date of filing of the petition; . . . .

Delaware Code, Title 8, section 122(2) provides that:

> Every corporation created under this chapter shall have power to:
>
> * * *
>
> (2) Sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name.

Delaware Code, Title 8, § 510:

> If any corporation, accepting the Constitution of this State, and coming under Chapter 1 of this title, or any corporation which has heretofore filed or may hereafter file a certificate of incorporation under said chapter, neglects or refuses for 1 year to pay the State any franchise tax or taxes, which has or have been, or shall be assessed against it, or which it is required to pay under this chapter, the charter of the corporation shall be void, and all powers conferred by law upon the corporation are declared inoperative, unless the Secretary of State, for good cause shown to him, shall have given further time for the payment of tax or taxes, in which case a certificate therefore shall be filed in the office of the Secretary of State stating the reason thereof. On or before the last day of November in each year, the Secretary of State shall notify each corporation which has neglected or refused to pay the franchise tax or taxes assessed against it or becoming due during the year that the chapter of the corporation shall become void unless such taxes are paid on or before March 1 of the following year.

Federal Rule of Civil Procedure, Rule 17(b):

> **Capacity to Sue or Be Sued.** The capacity of an individual, other than one acting in a representative capacity to sue or be sued shall be determined by the law of the individual's

> domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

STATEMENT OF THE CASE

This matter is based on facts which are unique to this case and arise rarely in the context of bankruptcy litigation. Petitioner's request for this Court to grant a Writ of Certiorari is therefore an attempt to satisfy the wishes of the Petitioner and does not involve a matter of national importance.

To further its petition to this Court the Petitioner presents a syllogism, unsupported by either evidence adduced at trial or by a citation to authority, that bankruptcy fraud is "rampant" and seeks to bootstrap from this unsupported allegation an opinion from this Court to the effect that neither Congress is competent to properly legislate to keep such alleged fraud in check, nor are the trial courts properly equipped to determine the factual basis as to when a transfer between a debtor and his transferee occurs. In the interest of comity, and to respect the authority of the trial courts, this request must be denied.

It was proved at trial in this matter that on June 10, 1989, the Respondent, Theodore Steven Roosevelt (Steven) and his then wife Judy, on the advice of a marital counselor, and in an attempt to save their failing marriage, executed a Marital Settlement Agreement, which set first forth the separate and community property of the Roosevelts, and then transferred to each of the Roosevelts such property as to effect a mutually satisfactory division of the property contained therein. Among the property contained therein was the family residence in Glendora, California. *In re Roosevelt (Ray v. Roosevelt)*, 176 B.R. 200, 202 (9th Cir. BAP 1994).

At trial the bankruptcy court heard uncontradicted evidence from third parties that the Roosevelts had contemporaneously discussed this transfer of assets with witnesses and further took evidence that in March of 1990, Judy Roosevelt asked for and obtained a quit claim deed from Steven pursuant the provisions of the Marital Settlement Agreement and then recorded this quit claim deed on April 14, 1990. Steven filed for bankruptcy on November 9, 1990. *In re Roosevelt (Ray v. Roosevelt)*, 176 B.R. 200, 203 (9th Cir. BAP 1994); *In re Roosevelt (Finalco v. Roosevelt)*, 87 F.3d 311, 313 (9th Cir. 1996).

The trial court concluded that the transfers effected by the document had been made by Steven with the intention to hinder, delay or defraud his creditors[1] but that Judy took under the Marital Settlement Agreement as a good faith transferee. *In re Roosevelt (Finalco v. Roosevelt)*, 176 B.R. 534, 535 (9th Cir. BAP 1995).

The trial court also held that the Marital Settlement Agreement was sufficient under California law to transfer

---

1. Based on an erroneous conclusion that the transfers effected by the marital settlement agreement were without value. *In re Roosevelt (Ray v. Roosevelt)*, 176 B.R. 200, 205-206 (9th Cir. BAP 1994).

Steven's interest in the Glendora real property to Judy; that the complained of transfer of the Glendora real property occurred on the date of the execution of the Marital Settlement Agreement and therefore the date of transfer of Steven's interest in the Glendora real property by the Marital Settlement Agreement was more than one year before the filing of his bankruptcy petition and granted him his discharge. *In re Roosevelt (Finalco v. Roosevelt),* 176 B.R. 534, 535 (9th Cir. BAP 1995).

The gravamen of Petitioner's argument before the United States Bankruptcy Appellate Panel for the Ninth Circuit, as well as the United State Court of Appeals for the Ninth Circuit has been that the transfer of the Glendora real property between Steven and Judy was not effectuated unless and until the transfer was made effective against third parties. Both Judges Vollin and Hagan for the Bankruptcy Appellate Panel of the Ninth Circuit, as well as a unanimous Court of Appeals for the Ninth Circuit have rejected this contention. *In re Roosevelt (Finalco v. Roosevelt),* 176 B.R. 534, (9th Cir. BAP 1995) and *In re Roosevelt (Finalco v. Roosevelt),* 87 F.3d 311 (9th Cir. 1996), *modified and request for rehearing en banc den.*, 98 F.3d 1169 (9th Cir. 1996).

REASONS FOR DENYING THE WRIT

I.

FINALCO, INCORPORATED IS A VOID CORPORATION WITHOUT CAPACITY TO PROSECUTE THIS APPEAL.

Before addressing the propriety of granting a Writ of Certiorari, this Court should be appraised that both the Petitioner, Finalco, Incorporated, and its corporate owner, Finalco Group, Incorporated, are void corporations under Delaware law, without

capacity to either sue or to be sued under the laws of the State of Delaware.

Finalco, Incorporated, has been chartered as corporation number 069-1814, and Finalco Group, Incorporated has been chartered as corporation number 068-2828, both under the aegis of the constitution and laws of the State of Delaware. Corporate powers under the laws of the State of Delaware include the capacity to maintain and defend legal actions. Delaware Code, Title 8, section 122(2).

On March 24, 1997, I received from the office of the Secretary of State of Delaware, declarations under seal to the effect that the charters of both of Finalco, Incorporated, and Finalco Group, Incorporated have been voided by the state of Delaware effective March 1, 1997, in accordance with Delaware Code, Title 8, Section 510 and as a result ". . . all powers conferred by law upon the corporation are declared inoperative," including the right to sue or be sued.

While the Federal Rules of Civil Procedure are admittedly not binding upon this Court, their promulgation by this Court to the district courts indicates that this Court places great weight on their authority. The Respondent has not been able to find a case on point in which a court of competent authority has decided the issue of whether a corporation that had been stripped of its charter during the pendency of an appeal was either allowed or denied to proceed, nonetheless Federal Rule of Civil Procedure Rule 17(b) provides in pertinent part that:

"The capacity of a corporation to sue or be sued shall be determined by the laws of the state under which it was organized." (*Accord, see Weinstock v. Sinatra*, 379 F. Supp 274, 275-76 (C.D. Cal.1974) and *Crossman v. Vivienda Water Co.*, 150 Cal. 575, 580, 89 P. 355, 337 (1907)). This Court has

previously ruled in agreement with Rule 17(b), holding over a century ago that ". . . *nul tiel* corporation, or that the plaintiff is not and never was a corporation, is a good plea at bar, because it goes to show that the plaintiff can never maintain any action whatever, ..." *Baltimore and Potomac Railroad Company v. Fifth Baptist Church*, 137 U.S. 568, 572, 11 S. Ct. 185, 186, 34 L. Ed. 784 (1891).

Since Finalco, Incorporated, and Finalco Group Incorporation, as a void corporations under the laws of the State of Delaware, are therefore without the legal capacity to sue or be sued in this Court, the petition for writ of certiorari should be denied for this reason alone.

II.

THIS ISSUE IS FACT SENSITIVE, OCCURS RARELY, AND IS A MATTER WHICH, WHILE IMPORTANT TO THESE PARTIES, IS NOT ONE OF IMPORTANCE TO THE PUBLIC.

In setting a standing for the granting of a writ of certiorari this Court long ago held that:

> . . . it is important that we be consistent in not granting certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of authority between the circuit courts of appeal.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, (1955), *quoting* Chief Justice Taft in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

The fact situation in which a valid transfer is made but not recorded at the time of transfer, the transfer is subsequently recorded, and then a creditor objects to the discharge of the transferring debtor on the basis of a fraudulent transfer has been a case of record, in addition to this case, only six times since 1907 (*Matter of Kock*, 20 B.R. 543 (Bankr. D. Neb 1982); *In re MacQuown*, 717 F.2d 859 (3rd Cir. 1983); *In re McKane*, 155 F. 674 (E.D.N.Y. 1907); *In re Munden*, 8 B.R. 142 (E.D. Va. 1981); *In re Plank*, 289 F. 900 (D. Mont. 1923) and *In re Roy*, 42 B.R. 102 (S.D. Fla.1984)). Of these cases, only *MacQuown* and the case at bar, have been the subject of a written opinion by a circuit court of appeals.

Contrast this paucity of cases with another recent bankruptcy related matter in which this Court did grant certiorari. In the case of *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) this Court resolved the issue of what would be considered a "reasonably equivalent value" in the context of a foreclosure sale under 11 U.S.C. § 548(a)(2). In *BFP* this Court contrasted the three different standards of measuring reasonably equivalent value adopted in the circuit courts of appeal, *i.e.*, the so-called "*Durrett* rule" *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980), the case-by-case analysis used in the Seventh Circuit in *In re Bundles*, 856 F.2d 90 (7th Cir. 1988) and the "*Madrid* rule", first put forward in *In re Madrid*, 21 B.R. 424 (9th Cir. BAP 1982).

A review of Shepard's Citations for these cases, conducted on March 24, 1997, revealed that *Durrett* had been cited over 100 times in all of the circuit courts of appeal, as well as four state courts; that *Bundles* had been cited over 60 times in all of the circuit courts of appeal, and in one state court; and that *Madrid* and its adoption in the United States Court of Appeal for the Sixth Circuit in the case of *In the Matter of Winshall*

Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985) had been cited over 100 times, in all of the circuit courts of appeal, and by two state courts.

BFP thus involved the settlement of an issue which was obviously "special and important to the public." This is not such a matter but is one which is merely of interest to the litigants, and concerns an episodic problem which is, at best, an academic problem more readily solved by the trial courts in their discretion. *C.f., Rice,* 349 U.S. at 74. For this reason, the Petition for a Writ of Certiorari should be denied.

III.

THE OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED IN THIS MATTER IS CORRECT.

The United States Constitution provides that the power of Congress is plenary in its ability to enact uniform laws on the subject of bankruptcy. U.S. Const., Art. I, § 8, cl. 4. In 1978, Congress exercised this plenary power in enacting a new Bankruptcy Code which was intended by Congress to be a complete rewrite of existing bankruptcy law [2]. As a result, among the issues considered by Congress in its enactment of a complete replacement of then existing bankruptcy law was the issue of when a transfer was considered to have occurred.

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2. "The bill is a complete rewriting of all of the bankruptcy law. It starts from scratch, because to attempt to make amendments to an 80-year-old law that has continually been amended during its long life would be to create an unintelligible and unworkable statute." Remarks of the Hon. Don Edwards, D-Calif., before the United States House of Representatives at the introduction of House Resolution 8200 which ultimately became Publ. L. 95-598, Title I, Nov. 6, 1978, 92 Stat. 2549, The Bankruptcy Reform Act, now codified at 11 U.S.C. §§ 101, *et seq.*, Cong. Rec. (Jan. 4, 1977), p. E 20.

Congress, in its 1978 enactment of 11 U.S.C. § 548(d) regarding the avoidance powers of the bankruptcy trustee provided that:

> **For the purposes of this section**, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, ...

(Emphasis added). In this matter, the Petitioner has failed in his request that the trial court, as well as the Bankruptcy Appellate Panel for the Ninth Circuit and the United States Court of Appeals for the Ninth Circuit adopt this so-called bona fide purchaser rule in the context of 11 U.S.C. § 727. *See In re Roosevelt*, 87 F.3d at 316, but *see also In re MacQuown*, 717 F.2d 859 (3rd Cir. 1983); *In re McKane*, 155 F. 674 (E.D.N.Y. 1907); *In re Roy*, 42 B.R. 102 (S.D. Fla. 1984).

These Ninth Circuit Courts of Appeal, however, have rejected this rule on the basis that there is no such notice requirement in 11 U.S.C. § 727. This may readily be understood by contrasting the language enacted in section 548(d)(1), to the effect that a transfer is not made until effective against a bona fide purchaser, with that enacted by Congress when its adopted 11 U.S.C. § 727 in 1978. Section 727 provides in pertinent part that:

> (a) The court shall grant the debtor a discharge, unless —
>
> * * *

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
>
> > (A) property of the debtor, within one year before the date of filing of the petition; . . . .

This statute is silent as to when a transfer is effective, and the trial court, as well as the Ninth Circuit Courts of Appeal which have heard this case have determined that a transfer is effective for the purpose of 11 U.S.C. § 727 when it is effective between the parties, *i.e.*, the so-called Party Rule. *See In Re Roosevelt*, 87 F.3d 317, for accord *see also Matter of Kock*, 20 B.R. 543 (Bankr. D. Neb 1982); *In re Munden*, 8 B.R. 142 (E.D. Va. 1981); and *In re Plank*, 289 F. 900 (D. Mont. 1923), all adopting the party rule.

This Court has previously held that "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S. Ct. 1588, 1593, 128 L. Ed. 2d 302 (1994). Congress has therefore acted intentionally when, in enacting sections 548 and 727 of the Bankruptcy Code, it placed a bona fide purchaser requirement to determine the effective date of a transfer in the former section but left the date of a transfer to the discretion of the trial court in the latter.

This conclusion is given even greater credence under the general rule that the trial courts are uniquely positioned to determine facts and to assess the credibility of witnesses. *In re Roosevelt (Finalco v. Roosevelt)*, 87 F.3d at 318. The Party Rule adopted by the United States Bankruptcy Appellate Panel for the Ninth Circuit, and confirmed by the United States Court of Appeals for the Ninth Circuit conforms to both the principles of comity in recognizing the plenary nature of Congressional power and intent in enacting these statutes as it did, as well as the inherent authority of the trial courts in judging questions of fact and law in cases before them.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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